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There has been a good deal said in the daily papers of late concerning contingent fees of lawyers, and an editorial upon the subject in a leading New York paper wherein such practice is deprecated has met with considerable criticism on the part of a very large and respectable portion of the bar. A letter of Andrew J. Hirschl, which appeared in the *Chicago Legal News*, voices the sentiment of the protesting lawyers. He says, very properly, that "whatever may have been the doctrine in the past it is now held almost uniformly that a lawyer is not only justified in taking cases on a contingency but at times is to be commended." The doctrine of champerty which was an indictable offense at common law has been steadily modified by the courts in this country, until now it may be said to be almost obsolete. Few, if any, American lawyers consider it wrong to take a case on the understanding that it is only in the event of success that the attorney is to receive any compensation and then in the shape of a portion of the amount realized from the litigation. To hold that an injured person without means to retain a lawyer, cannot engage one on a contingency would be, in many instances, a denial of all remedy. It is quite true that the practice is at times abused, and that it occasionally happens that cases without merit are taken and commenced by attorneys upon contingent fees, but it is equally true that cases without merit are as often begun where the attorney is paid a cash retainer. It will, at this day, be impossible to convince the larger portion of the bar of this country that there is anything reprehensible in the practice of taking contingent fees, when necessary.

A late decision by Judge Stein of the Superior Court at Chicago in the case of Ackley v. The North Chicago Street Railroad Company emphasizes this conclusion. It appeared in that case that Mary Butler received personal injuries through the negligence of defendant by being thrown from a street car and that she retained complainant, with whom she entered into a written contract to pay him one-half of whatsoever should be obtained from the company, and to advance all court costs and expenses. To secure payment of the fee she assigned to him one-half of all rights of action she had by reason of the injury and one-half of any verdict or judgment that might be obtained. Suit was brought in her behalf against the North Chicago Street Railroad Company by Ackley in the Cook County Circuit Court and the case was placed on the trial call in April last. One of the company's lawyers went to Mrs. Butler's house and got a release from her without consulting her attorney by paying her $3,750. Afterward they appeared in court and had judgment entered up against the company and in favor of Mrs. Butler for that amount and satisfied in open court. Both Mrs. Butler and the company refused to pay the attorney the fee agreed upon. Attorney Ackley thereupon filed a bill in equity in the Superior Court against the company, stating the foregoing facts. He said that at the time of the settlement he had bestowed a large amount of work upon the case, relying upon the contingent fee of one-half, that the railroad company had full previous knowledge and actual notice of his contract rights and of the services rendered and that the settlement was made for the fraudulent purpose of depriving him of the money to which his contract entitled him. It was averred in the bill that by the assignment Ackley became owner of one-half the cause of action and that the defendant had no authority from him to pay his share of the proceeds to his client.

Judge Stein held that a cause of action for personal injuries is assignable, and that the assignment of a part of an expected judgment is good in equity. He decided that the agreement between attorney Ackley and Mrs. Butler was not against the policy of the law, that the settlement after notice stated in the bill was in fraud of complainant's rights and that the railroad company must pay to the complainant one-half the amount for which settlement was effected. It will be interesting to watch the outcome of this case in the Appellate Court. If the doctrine laid down by Judge Stein is correct, attorneys who stipulate for contingent fees have within their power an effective means of protecting themselves against unreliable clients.

NOTES OF RECENT DECISIONS.

NEGOTIABLE INSTRUMENT — PROMISSORY NOTE—EVIDENCE—FINANCIAL REPUTATION OF PAYEE.—In Bliss v. Johnson, 38 N. E. Rep. 446, decided by the Supreme Judicial Court of Massachusetts, it was held in an action on a note, the making of which was denied, that the fact that the payee had no money to loan could not be shown by his "reputation" for being "hard up" at the time the note purported to have been given. The court said, among other things:

The first exception is to the refusal of the court to allow a witness called by the defendant to testify "what the plaintiff's reputation was as to being financially hard up and embarrassed at the time when the note purported to have been given." We are of opinion that this question was properly excluded. In an action for money lent, or in an action on a promissory note, where the consideration is money lent, it is competent for the defendant to show that the person claiming to have lent the money had no money to lend, and his financial condition may be shown. Stebbins v. Miller, 12 Allen, 579; Winchester v. Charter, 97 Mass. 140; Woodward v. Leavitt, 107 Mass. 453, 458; Higgins v. Andrews, 121 Mass. 293; Costelo v. Crowell, 133 Mass. 352; Demerritt v. Miles, 22 N. H. 523; Wiggin v. Plumer, 31 N. H. 251; Dowling v. Dowling, 10 Ir. C. L. 236. In none of these cases was any attempt made to introduce evidence of the financial reputation of the lender, and we have found no case where such evidence has been admitted on the issue of the making of a loan. "Reputation," as said by Le Blanc, J., in Higham v. Ridgway, 10 East, 109, 120, "is no other than the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another." The general rule is that heresay evidence is to be excluded. To this rule there are certain well-defined exceptions, but the case at bar does not fall within any of them. There is a class of cases relied upon by the defendant, where evidence of reputation has been admitted, namely, where a conveyance is sought to be set aside as a fraudulent preference, and the question is whether the grantee had reasonable cause to believe that the grantor was solvent or insolvent at the time of the making of the conveyance. Here the inquiry is as to the state of mind or belief of the grantee, and it is said that any evidence is competent which tends to show the existence of such facts or circumstances as would naturally influence the mind of an honest and reasonable man in forming a conclusion in relation to the subject-matter involved in the issue. Carpenter v. Leonard, 3 Allen, 32, per Bigelow, C. J. Another reason is stated by Mr. Justice Metcalf in Barrett v. Decreet, 4 Gray, 111, 113, who says that the testimony is admissible on the ground "that men's belief as to matters of which they have not personal knowledge is reasonably supposed to be affected by the opinion of others who are about them." See, also, Lee v. Kilburn, 3 Gray, 594; Heywood v. Reed, 4 Gray, 574; Whitcher v. Shattuck, 3 Allen, 319. And in Sweetser v. Bates, 17 Mass. 476, it was held that in such a case the general reputation of all the parties to the transaction as to their credit and pecuniary responsibility was properly admitted. The case of Trimmer Co. v. Case, 144 Mass. 350, 11 N. E. Rep. 549, falls within the same exception. The action was replevin of a machine. The evidence was conflicting on the point whether the plaintiff delivered the machine on an absolute sale on credit or on a conditional sale. Evidence that the purchaser's reputation for financial ability was poor was held to be competent to show that it was probable that credit was not given to him. See, also, Lee v. Wheeler, 11 Gray, 236.

INSURANCE—PROPERTY COVERED.—In Benton v. Farmers' Mut. Fire Ins. Co., 60 N. W. Rep. 691, the Supreme Court of Michigan holds that an insurance policy on a frame building and "contents" therein does not cover property removed therefrom to a new building in the farm, and that such policy on the "contents" in a granery or in "stocks" on farm, does not cover grain stored in another building than the granary. The court says:

In Everett v. Insurance Co., 21 Minn. 76, the property was described in the application as "stored in barn on," etc., and in the policy as a "threshing machine," reference being made to the application for a more particular description. In Holbrook v. Insurance Co., 25 Minn. 229, the property was described as "36 mules, contained in," etc. In McCluer v. Insurance Co., 43 Iowa, 349, a phaeton was destroyed while in a carriage shop for repairs. In Haws v. Association, 114 Pa. St. 431, 7 Atl. Rep. 159, certain horses, "all contained in," etc., were insured under a policy containing a lightning clause. One of the horses was killed by lightning while at pasture in a field on plaintiff's farm. The court say: "It is true, in an insurance upon such personal property as household goods or a stock of merchandise, the words 'contained in a' particular building would seem to imply that the property insured should remain in such building, and that, if removed therefrom, the policy would not cover it. But in such cases the contract contemplates that the property shall remain in the building, and there are obvious reesons why a change of location would affect the insurance. The very nature of such property implies permanency in its location. But it is not so with a man's horse. It is of no use to him if kept in a stable. We can understand that if, in a fire policy, hay, straw, or grain is insured in a barn, the insurance would cease if removed to some other building. Such would be the reasonable meaning of the contract of insurance, and what the parties probably contemplated when they made it. But none of this reasoning applies to a lightning clause upon horses or other stock. The terms and conditions to which such an insurance is subject must be such as are reasonably applicable to such kinds of insurance upon this particular species of property, and such, therefore, as the parties may be presumed to have had in view when the contract was made." In Peterson v. Insurance Co., 24 Iowa, 494, the policy covered plaintiff's seven horses, situated on section 22, etc. While marketing his grain, plaintiff put up at an hotel, and placed his horse in the hotel barn, which was destroyed by fire. In these cases the property was fully described without reference to the words describing its location, and, when destroyed, it was in a situation which from its very nature may well be

deemed to have been within the contemplation of the parties at the inception of the policy.

Lord Mansfield observed in Pelly v. Governor, etc., 1 Burrows, 341, that the insurer, in estimating the price at which he is willingto idemnify the insured, must have under his consideration the nature of the business, and the usual course and manner of conducting it, and everything done in the usual course most have been foreseen and in contemplation at the time he engaged, and that he takes the risk upon the supposition that what is usual or necessary will be done. The rule has been extended by some authorities to cases where the policy has described a class of property and the risk a shifting one. In Longueville v. Assurance Co., 51 Iowa, 553, 2 N. W. Rep. 394, certain wearing apparel was burned while being worn. In Noyes v. Insurance Co., 64 Wis. 415, 25 N. W. Rep. 419, a dolman was burned while at a furrier's for repairs. In De Graff v. Insurance Co., 38 Minn. 501, 38 N. W. Rep. 696, the policy covered "$3,000 on his wood barn; $2,500 on his stock therein." The policy contained a lightning clause. A few weeks before the loss, plaintiff put one of the horses into a new barn, which had been built, where she remained until killed by lightning. The removal was alleged to have been but temporary. The court say: "Words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to another class of property, or as to other kind of insurance, it might be construed as mere description for the purposes of identification. This action is to recover for the loss of live stock by lightning, and the language of the policy must therefore be construed as applied to insurance upon that particular species of property. The parties must be presumed to have known that danger from lightning exists almost wholly in the summer, when live stock is out in the fields. No man of common sense would take a policy of insurance against lightning which only covered his stock when in a particular barn. Such stock cannot well be, and is not usually, kept permanently in a building. The ordinary uses to which it is put forbid it; and the usual and proper treatment of it requires that it be turned out to pasture about one-half the year at least. According to the usual course of farming operations, it is not customary to treat an animal, even when housed, as attached to some particular building, as a part of its contents, but to change its place of stableing from time to time, as necessity or convenience may require. The parties must be presumed to have had all these facts in view when they made this contract. If appellant's contention be correct, this policy would not cover a loss occuring while the stock is out at pasture, during the summer, for that could hardly be called a 'temporary removal' from the barn for some temporary purpose incident to the ordinary use and enjoyment of the property. * * * Our conclusion is that the statement in the policy that the stock was in this barn is not a promissory stipulation on the part of the insured, or a condition of insurance on part of the insurer, that such location should remain unchanged, but to that class of property, and as to that kind of insurance, at least, is mere matter of description for identification of the property insured, indicating that it was the stock which was usually kept in that barn at that time." In Insurance Co. v. Elliott, 85 Va. 962, 9 S. E. Rep. 694, the policy covered "carriages, buggies, hacks, and harness" in a building occupied as a livery and sales stable, and certain of the vehicles were in a repair shop when destroyed. But see Bradbury v. Insurance Co., 80 Me. 396, 15 Atl. Rep. 34. In none of these cases, however, was the property described simply as contents of the building named, nor was the *situs* of the property (when not in use) permanently changed.

In Wildey v. Insurance Co., 52 Mich. 446, 18 N. W. Rep. 212, the policy covered "personal farm property in buildings and on farm." The by-laws of the company did not allow it to insure village property that was within 100 feet of other buildings. A horse was destroyed by fire while in the barn of a village hotel that stood within 100 feet of other buildings. The court in that case say that, where particular property is specified as covered by the risk, it may well be held covered, though moved elsewhere, unless there are clear provisions to the contrary; but, where property is only insured as farm property, it may be so restricted as to raise very different presumptions. The defendant was, however, held not liable, on the ground that there could be no implied liability where an express undertaking was forbidden. In English v. Insurance Co., 55 Mich. 273, 21 N. W. Rep. 340, the policy insured household goods, furniture, clothing, etc., all contained in his two-story frame dwelling house and additions occupied as a residence. A fire occurred, which rendered the house unhabitable, and some of the household goods were removed to and stored in the barn. A month afterwards the barn was burned, and it was held that there would be no recovery for the household goods destroyed in the barn. In Association v. Kryder (Ind. App. 1892), 31 N. E. Rep. 851, the description was precisely like that in the present case. The policy, however, contained a lightning clause. While approaching the barn with a load of wheat, two horses, which were usually kept in the barn, were killed by lightning. The court held that the language "contents of same" referred to the contents at the time of the loss of the barn, and that there would be no recovery. In that case, however, the property insured was animate property. There was a lightning clause in the policy. The insurance of that class of property was contemplated, and its use in the ordinary and usual course rendered temporary absence from the barn necessary, and it is unnecessary to follow the case. The general rule is that place and location is of the essence of the risk. 1 Wood, Ins. § 47; 2 May, Ins. §§ 401*a*, 401*b*. No case has been called to our attention as coming within any of the exceptions to the rule where the property has been described as household goods or stores contained in a certain dwelling, or as a stock of goods in a certain store, or as farm products contained in a barn, or simply as the contents of a dwelling, store, or barn, where the property consisted of articles having a permanent location for use, sale, or consumption, and its ordinary use did not involve the necessity for temporary removal. Again, every case presented has been one where the property has been destroyed while in a situation incident to its enjoyment, or repair. Nor has a case been suggested or found where the property has been permanently removed from the abiding place named in the policy, stored or kept elsewhere, and destroyed while in such new place of deposit. In Lyons v. Insurance Co., 14 R. I. 109, it was expressly held that a permanent removal of the property from the place insured would withdraw it from the protection of the policy. To the same effect is English v. Insurance Co., 55 Mich. 273, 21 N. W. Rep. 340.

NEGLIGENCE — PROXIMATE AND REMOTE CAUSE.—In Goodlander Mill Co. v. Standard Oil Co., 63 Fed. Rep. 400, the United States Court of Appeals for the seventh circuit had before it a perplexing question as to liability for negligence. Defendant shipped a car load of crude petroleum in a car which had no valve regulating the outflow of the oil. The consignee had the car removed to a side track, and then, with knowledge that the car was leaking, attempted to draw off the oil near plaintiff's mill, the engine room of which was lower than the track. Owing to the absence of the valve, the oil ran out so rapidly that it flowed into plaintiff's engine room, exploded, and destroyed the mill. It was held that defendant was not liable therefor, since its negligence was not the proximate cause of the injury. The court, after discussing the rule that one who uses a dangerous agency does so at his own peril, and must respond to the injuries thereby occasioned not caused by extraordinary natural occurrences or by the interposition of strangers, says:

Thus, in Thomas v. Winchester, 6 N. Y. 397, an apothecary carelessly labeled a poison as a harmless medicine, and sent it so labeled into the market. He was held liable to all who, without fault on their part, and in consequence of the false label, were injured by its use. Norton v. Sewall, 106 Mass. 143; Bishop v. Weber, 139 Mass. 411, 1 N. E. Rep. 154; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. Rep. 350,—are like cases.

The rule is limited, however, and justly so, to instruments and articles in their nature calculated to do injury, such as are essentially and in their elements instruments of danger; to acts that are ordinarily dangerous to life or property. Loop v. Litchfield, 42 N. Y. 351, 357. And so, where the wrongful act is not immediately dangerous to the life or property of others, the negligent party is liable only to the party with whom he contracted. Collins v. Selden, L. R. 3 C. P. 496, cited with approval in Bank v. Ward, 100 U. S. 195, 204. Thus, in Davidson v. Nichols, 11 Allen, 514, the defendant, a wholesale druggist, negligently delivered to a customer sulphide of antimony for black oxide of manganese. The purchaser, a retail druggist, delivered the package unopen to the plaintiff, both supposing the substance to be black oxide of manganese. In that belief the plaintiff proceeded to use the same in combination with chloride of potassium,—a substance with which the oxide may be safely and properly used, but from the combination of which with sulphide of antimony a dangerous explosion follows. The plaintiff was injured by the resulting explosion, and brought suit. The court held the defendant not liable. . . .

And so in Losee v. Clute, 51 N. Y. 494, the manufacturer of a steam boiler constructed it improperly and of poor iron, knowing that it was to be used in the vicinity of and adjacent to dwelling houses and stores; so that, in case of an explosion while in use, there would be likely to be destruction to human life and adjacent property. After delivery and acceptance by the purchaser, and while in use by him, an explosion occurred, in consequence of such defective construction, to the injury of a third person. It was held that the latter had no cause of action against the manufacturer.

In Bailey v. Gas Co., 4 Ohio Cir. Ct. R. 471, the defendant, under contract with another, put in fixtures for using natural gas for heating a steam boiler connected with an engine in the electric plant of that other. By reason of negligence and imperfect construction of the fixtures, an explosion ensued, and the engineer in charge of the boiler and engine was injured, and brought suit. It was held that there was no contract relation between the plaintiff and the defendant, and that the defendant owed him no duty. It was there conceded that gas, under certain circumstances, might be a dangerous article; that it was explosive when allowed to escape so as to come in contact with flame. It was not in and of itself dangerous. And the defendant was acquitted, although the imperfect fixtures were placed by it for the purpose of being used in connection with the use of gas as fuel. See, also, Blakemore v. Railway Co., 8 El. & Bl. 1035; Burdick v. Cheadle, 26 Ohio St. 393; Roddy v. Railway Co., 104 Mo. 234, 15 S. W. Rep. 1112; Curtin v. Somerset, 140 Pa. St. 70, 21 Atl. Rep. 244.

There is a class of cases of which Heaven v. Pender, 11 Q. B. Div. 506, and Devlin v. Smith, 89 N. Y. 470, are examples, holding the builder of a scaffolding to be used by workmen, and negligently constructed, rendering it unsafe, liable for an injury occurring from its use. These cases recognize the rule that the liability of the builder is in general only to the person with whom he contracted, but rest liability to third persons upon the ground that the defect was such that it rendered the article in itself immediately dangerous, and that serious injury was the natural and probable consequence of its use. Of the same character is the case of Necker v. Harvey, 49 Mich. 517, 14 N. W. Rep. 503, holding the constructor of an elevator, while in possession of and operating it, liable to a stranger for injuries arising from its negligent and unsafe construction; otherwise, if possession had been surrendered.

We are thus brought to the question whether crude petroleum may properly be classified as a "dangerous agency," within the meaning of the rule. It is an extensive article of commerce, transported by rail to all parts of the land, shipped in steamers and sail vessels to all parts of the world. It is innocuous of itself. It is dangerous only when in considerable quantity it is brought in contact with fire. It is in general use for fuel and other purposes. It is no more volatile than turpentine, no more explosive than gas; does not necessarily, in its handling, involve imminent danger to any one. It is not a dangerous agency of itself, but becomes such by subjection to a high degree of heat, or from actual contact with fire. The shipment of such an article of commerce casts upon the shipper a certain duty to the public,—that of providing a suitable vehicle for the petroleum in all respects adapted to the purposes of carriage, and able to encounter the usual risks of transportation, so that the petroleum in its transit should not be exposed to danger of ignition from causes incident to its transportation, reasonably to be anticipated. We think that to be the true limit of the shipper's duty, and that duty, as it appears to us in this case, was properly discharged. The petroleum was contained in a tank impervious to fire. The shipment reached its destination in safety. The case is not like that of the shipment of explosives, the character of the shipments

being concealed. Brass v. Maitland, 6 El. & Bl. 470; Farrant v. Barnes, 11 C. B. (N. S.) 553; The Nitro-Glycerine Case, 15 Wall. 524. Here the contents of the tank were declared by the peculiar construction of the car. The properties of the petroleum were known to the consignee and to the public equally with the defendant. They are matter of common knowledge. There was no disguise and no concealment. ''.

CRIMINAL LIBEL—EVIDENCE — ABSENCE OF KNOWLEDGE BY NEWSPAPER PROPRIETOR.—The case of State v. Mason, 38 Pac. Rep. 130, is instructive on the subject of criminal libel. It is there held that where a libelous article does not name the person alluded to therein, witnesses in a criminal prosecution may testify that, on reading the article, they understood, from their acquaintance with the prosecuting witness and the circumstances alluded to in the article, that it was intended to refer to him; and that under Code, § 1749, providing that any person who publishes, or causes to be published, concerning another, any false or scandalous matter, "with intent" to injure, etc., shall be punished, it is no defense by a newspaper proprietor, indicted for libel, that the libelous article was published without his consent or knowledge, unless it further appears that the publication did not occur through any negligence or want of ordinary care on his part. Upon the first point the authorities are somewhat conflicting. In the following cases it is held that such evidence is not admissible for any purpose: Van Vechten v. Hopkins, 5 Johns. 211; Gibson v. Williams, 4 Wend. 320; Goodrich v. Davis, 11 Metc. (Mass.) 484; Snell v. Snow, 13 Metc. (Mass.) 282; Oldtown v. Shapleigh, 33 Me. 278. But, on the other hand, it is held, and the Oregon court thinks with the better reason, that when the words are ambiguous as to the person intended, and their application doubtful, persons who read the libel, and are acquainted with the parties and the circumstances, may state their judgment and understanding as to whom the libelous charges referred. 2 Greenl. Ev. § 417; Odger, Lib. & Sland. 539; Smart v. Blanchard, 42 N. H. 137; Russell v. Kelley, 44 Cal. 641; Miller v. Butler, 6 Cush. 71; Nelson v. Borchenius, 52 Ill. 236; Knapp v. Fuller, 55 Vt. 311; McLaughlin v. Russell, 17 Ohio, 475; note to Van Vechten v. Hopkins, 4 Am. 339. Dec. Upon the second point in the case the court has this to say:

The question then recurs as to whether the manager or proprietor of a newspaper can escape criminal responsibility solely on the ground that the libelous article was published without his knowledge or consent. When a libel is published in a newspaper, such fact alone is sufficient evidence *prima facie* to charge the manager or proprietor with the guilt of its publication. By the English authorities, prior to Sts. 6 & 7, Vict. ch. 96, it was generally held, though not without some dissent, that the presumption was not overcome by showing that the defendant was perfectly innocent of any share in the criminal publication, upon the ground that it was necessary in order to prevent the escape of the real offender behind some irresponsible person. Rex v. Gutch, 1 Moody & M. 433, 22 E. C. L. 559; Rex v. Walter, 3 Esp. 21. But, by the statute referred to, the question was put at rest, and a defendant was permitted to prove as a defense that the publication was made without either his consent or knowledge, and that it did not arise from want of due care or caution on his part. This it is believed, is but a statutory declaration of the principles which ought to limit criminal liability for the acts of another, and which have generally been recognized by the courts of this country in similar cases. The manager and proprietor of a newspaper, we think, ought to be held *prima facie* liable criminally for whatever appears in his paper; and it should be no defense that the publication was made without his knowledge or consent, unless it further appears that it did not occur through any negligence or want of ordinary care on his part. One who furnishes the means for carrying on, and derives profit from, the publication of a newspaper, and intrusts its management to servants or employees, whom he selects and controls, may be said to cause to be published what actually appears, and should be held responsible therefor, whether he was individually concerned in the publication or not, if he did not exercise proper care and oversight over the business intrusted to his servants. Criminal responsibility for the acts of an agent or servant in the course of his employment necessarily implies some degree of moral guilt or delinquency on the part of the principal; but this may be shown either by direct participation in or assent to the act, or by a want of proper care or oversight or other negligence in reference to the business intrusted to the servant. We think, therefore, the mere fact that the libelous article was published in the newspaper without the knowledge or consent of its proprietor or manager is no defense to a criminal prosecution against such proprietor or manager. In Com. v. Morgan, 107 Mass. 199, this question was considered, and it was held that in a criminal prosecution the publisher of a newspaper in which a libel appears is *prima facie* presumed to have published the libel, and that the exclusion of an offer by the defendant to prove that he never saw the libel, and was not aware of its publication until it was pointed out to him, and that an apology and retraction were afterwards published in the same paper, gave him no ground of exception. This case is so well considered, and the rule governing the criminal liability of the publisher of a newspaper for a libelous article appearing therein is so satisfactorily stated, that we venture to quote from the opinion of the court at some length. The court, speaking through Mr. Justice Colt, says:

"It is the duty of the proprietor of a public paper, which may be used for the publication of improper communications, to use reasonable caution in the conduct of his business that no libels be published. He is civilly responsible for the wrong, to the extent indicated; and he is criminally liable, unless the unlawful publication was made under such circumstances as to

negative any presumption of privity or connivance or want of ordinary precaution on his part to prevent it. 3 Greenl. Ev. §§ 170, 178. We are of opinion that the offer of the defendant did not go far enough, in view of the law thus stated, to rebut the presumption of guilt arising from the publication of this libel. The facts offered may be true, and yet entirely consistent with the fact that the conduct of the newspaper was under his actual direction and charge, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ. It is consistent also with such information, in this instance, in regard to the proposed libelous attack, as should have put him on inquiry, and with the fact that the general management of the paper was of such a character as to justify the inference that the defendant approved of or connived at publications of this description, and had given his general assent to them. Under such circumstances, the defendant ought not to be permitted to escape on the plea that he had not seen the particular article, and did not know of its publication." So, also, in the case at bar. The fact that defendant did not see or know of the libelous article until after its publication is not in any way inconsistent with the other fact that the paper may have been under his personal supervision and control, so that his want of knowledge would necessarily imply either a criminal neglect in failing to exercise proper care and supervision over his subordinates, or criminal indifference as to the character of the articles appearing in the paper. It is entirely consistent, also, with the fact that the management of the paper and its general character may have been such, and, indeed, if we are to judge from the copy of it appearing in the transcript, it undoubtedly was such, as not only to justify the inference, but the belief, that its proprietor or manager approved of or connived at the publication of articles of the character set out in the indictment, and had at least given his general consent to their publication.

CONVERSION OF LOGS—DAMAGES—INCREASE IN VALUE.—One of the points decided by the Supreme Court of North Carolina in Gaskins v. Davis, is that one who, believing he is on his own land, cuts logs from the land of another, cannot, when they are retaken by the lawful owner, set up a claim for their increase in value, caused by his having transported them to a place where there was a ready market, nor can he set up such claim in an action by the owner against him for damages for cutting other logs. The court says:

The well established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel (Bennett v. Thompson, 13 Ired. 146), together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. Potter v. Mardre, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." In Potter v. Mardre, *supra*, Rodman, J., delivering the opinion of the court, says: "The principle of equity (applied in that case) is supported by the anlaogy of the rule established in this State by the decisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. Albea v. Griffin, 2 Dev. & B. Eq. 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz: by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass,—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. Potter v. Mardre, *supra;* 5 Am. & Eng. Enc. Law, p. 36; Ross v. Scott, 15 Lea, 479. The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the plaintiff is asking damage for the trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the cost of severance. Coal Co. v. McMillan, 49 Md. 549. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The plaint. iff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks, and used to construct a boat, the plaintiff would not have been entitled to recover the boat, or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any, done to his land in removing it therefrom; but the present plaintiff would have been entitled "to deduct or recoup, by way of counterclaim, the value of the timber which was manufactured into the canoe, just after it was felled and converted into a chattel." Potter v. Mardre, *supra.* It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of better-

ments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In Ross v. Scott, *supra*, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal *in situ*, subject to reduction by an allowance for permanent improvements put upon the land. See, also, *In re* United Merthyr Colleries Co., L. R. 15 Eq. 46; Hilton v. Woods, L. R. 4 Eq. 432; Forsyth v. Wells, 41 Pa. St. 291. The weight of authority it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden v. Johnson, 52 Vt 628, 36 Am. Rep. 769, and note, 770; Herdic v. Young, 55 Pa. St. 176; Hill v. Canfield, 56 Pa. St. 454; Moody v. Whitney, 38 Me. 174; Cushing v. Longfellow, 26 Me. 306; Goller v. Fett, 30 Cal. 482; Foote v. Merrill, 54 N. H. 496; Railway Co. v. Hutchins, 32 Ohio St. 571. In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this State that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In Weymouth v. Railroad Co., 17 Wis. 550, the court say: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrong-doer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrong-doer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrong-doer shall lose." *Id.*, 26 Am. Rep. 529, note. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found.

WORKS OF CHARITY AND NECESSITY WITHIN THE MEANING OF THE STATUTES FORBIDDING LABOR ON SUNDAY.

Sabbath laws do not rest upon the fact that it is immoral or irreligious to labor upon the Lord's day. A day of rest simply is provided for from motives of public need, and as a civil regulation. We call the day prescribed the Christian Sabbath, yet is this prescription so entirely dependent upon civil regulation and social need that the statutes would be equally good if they named any other day.[1] The duty of observing the day set apart by law is imposed upon all alike, without reference to religious faith or manner of worship. The day as a day of rest is a legal holiday. None are compelled, jews, seventh day adventists, or any other denomination or sect, to keep it, against a conscientious scruple, as a day of worship.[2] The provision in the Massachusetts statute which prohibits traveling, like the law which prohibits the doing of any business, labor or work, except what is done from "necessity or charity."

The exception covers everything morally fit and proper to be done upon that day under the circumstances of each case. Charity includes everything that springs from a sense of moral duty, or from a feeling of humanity, and is intended wholly for the relief or comfort of another, and not for any selfish interest. Laws setting aside Sunday as a day of rest from labor and toil, are not upheld by law because of any power of government to authorize such legislation for the promotion of any religious observance, since this would be in opposition to the constitutional inhibi-

1 See McGatrick v. Mason, 4 Ohio St. 571; Bloom v. Richards, 2 *Id.* 387.

2 See Commonwealth v. Starr, 144 Mass. 361; *Ex parte* Burke, 59 Cal. 6, 13-20; *Ex parte* Roser, 60 Cal. 188.

tion of such legislation. A regard for the welfare of its subjects dictates such a policy for the government to follow as tends to protect its citizens from the moral as well as physical debasement, which springs from uninterrupted manual labor. Such laws have always been deemed beneficient and merciful laws, especially to those persons who live by the long hours of toil in factory and workshop, in the heated rooms of great cities where less attention is paid to the hygiene condition of the workshop than to the appointments of the stables of the employer where is kept his highly groomed stud. The validity of these laws has been upheld by the highest authority in most States of the Union, and, indeed, most countries of the world.[3] Blackstone, in his commentaries on the Law of England, says:[4] "The notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to the State, considered merely as a civil institution. It humanizes by the aid of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens."

Because of this principle of public policy in the observance of a day of rest, any contract made on this day is said to be void by statutory act. The common law recognized no impediment in the way of making binding contracts on Sunday. The Pennsylvania court, in a recent case,[5] holds that making a will on Sunday is not such secular labor as is forbidden, and the same court has held in the case of Dale v. Knapp,[6] that subscriptions made on Sunday for the support of public worship are binding, and come within the exception to contracts generally made on that day. Same doctrine upheld by Michigan Supreme Court,[7] while the case of Caplett v. Meth. Epis. Church,[8] the doctrine is *contra* on this point.

In the Michigan case above cited, objection was made to the payment of the subscription because it was solicited and promised upon that day to help in building a place for public worship. The court, Cooley, Justice, giving the opinion, hold that a recovery may be had on a subscription of this kind made on Sunday, because it comes within the excepted class of secular business, prohibited by the statute, that is, it is business done for "sweet charity's sake." Judge Cooley says: "Charity is active goodness. It is doing good to our fellow-men. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind. As the term charity is made use of in our law, it no doubt takes on shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which punish what the Christian regards as the desecration of the first day of the week." And, again: "The support of religious societies being in itself a charity, the general custom of such societies as to the methods by which the means of support may be collected, may throw light on the question what is admissible. The general sense of a Christian people has demanded and secured the laws, and their method of observing the day must be some evidence of the sense in which the law is enacted. Now, it is matter of common observation, that religious societies solicit moneys for their needs and take subscriptions at their regular meetings on the first day of the week. The custom is from time immemorial. The regular Sabbath offerings, as they are called, are limited sometimes to gifts for the poor, or for sacramental purposes, or missions, but quite as often they embrace gifts for the general

[3] See Commonwealth v. Dexter, 143 Mass. 28; Parker v. State, 16 Lea, 476; Richmond v. Moore, 107 Ill. 433; Soon Hing v. Crowley, 113 U. S. 710; Shover v. State, 10 Ark. 262; Commonwealth v. Nesbit, 34 Pa. 405; Lindenmuller v. People, 33 Barb. (N. Y.) 568; Sparhawk v. Union Pass. Ry. Co., 54 Pa. 433; More v. Clymer, 12 Mo. App. 14. See also, 28 Am. Law Reg. 273, 34 *Id.* 725, and cases cited; 18 South Law. Rev. 273 and cases; 21 Am. Law Rev. 533, and cases; 26 Cent. Law Journal, 103 and cases.

[4] 4 Blackstone Com 63.

[5] Beltenman's App., 55 Pa. 154.

[6] 98 Pa. 389.

[7] Allen v. Duffie, 43 Mich. 1.

[8] 62 Ind. 365.

needs of the society, including repairs of the church, the lighting and heating, the payment of the taxes, and the numerous other needs which do not differ at all from the needs of ordinary business associations. Nobody has ever asserted, so far as we know, that the taking up of these Sabbath offerings was illegal and punishable under the statute. * * * And if small sums may be gathered on Sunday for the support of public worship, and for providing buildings for the purpose, and keeping them in repair, why not large sums? Does the amount of the gifts make any difference when the general object is the same? Is it legal for deacons, vestrymen or other officers to pass a box for the reception of contributions in small change, and illegal for the minister, as he stands in his pulpit, to solicit contributions in dollars? * * * We have no doubt whatever, that the support of public worship is a work of charity within the meaning of the statute, and that promises like the one now in question may be sustained on that ground."

Referring to the case of Catlett v. Trustees, etc.,[9] Judge Cooley says, it was assumed by the Supreme Court of Indiana, that such a promise was illegal. The case as reported does not show that any contest upon the question of legality was made. The decision turned upon a question of ratification. A point assumed without consideration is not decided. Some of the sentiment which prompted the severity of the old "Blue Sons" of Massachusetts, must have been implanted into the statutory laws of Indiana. At any rate there appears with decisions of that court upon such questions of like import, which came before it, an indication of standing upon a strict construction of the fourth commandment.

In Shaw v. Williams,[10] the court holds that the publication of a sheriff's notice of sale in a Sunday newspaper renders the notice void. This *dictum* from a court of last resort seems incredible. That a jury should, from a weak sentimentality, arrive at this conclusion, is not to be wondered at. Of course it might be presumed that those interested in the notice could not have the same opportunity of seeing this notice in the paper because published on a Sabbath day. That they were not legally bound to take notice of such a publication, although having the same opportunities as if published upon a secular day. But where a statute fixes a continuous period, during which a notice must run in order to be of binding force, and the paper is issued containing such notice upon a Sunday, would this vitiate the notice? Most assuredly not, and yet some part of the legal notice has been given on a Sabbath day. We can well understand the principle which would hold the publication of a paper upon the Sabbath, as labor neither necessary nor of a charitable character, and yet such publication is upheld by the principle of public policy. The public generally receive a benefit from such publication. It is the time when a large mass of the people of this or any other country gets its first opportunity to see what the world at large is doing. Society is not outraged in the least by the mere publication of a legal notice in a newspaper on Sunday. The paper is read that day more than any other. The notice more apt to be seen on that day than any other. But if the notice is confined to a purely Sunday issue of a paper, this objection is probably very consistent.

Crying newspapers for sale in Philadelphia in 1853 was equivalent to being disorderly. And Massachusetts, by its Supreme Court in the case of Commonwealth v. Osgood,[11] holds that selling newspapers on the street or otherwise is "business" within the meaning of the laws of that State. But under the laws of Massachusetts a person is permitted to visit his sick sister on the Sabbath,[12] and an employer to go to the home of his servant with a conveyance to carry her back, although the trip is made on a Sunday.[13] The running of passenger trains has been held a necessity in some cases.[14] In the case of State v. Frederick,[15] the court takes judicial notice that the labor of a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exception to the statute. And also that merely keeping open the shop did not constitute any offense under the law. The reporter of the American Reports in a note after the principal case reported

[9] 62 Ind. 365, *supra*.
[10] 87 Ind. 158.
[11] 144 Mass. 362.
[12] Cronan v. Boston, 136 Mass. 384.
[13] Crossman v. Lynn, 121 Mass. 301.
[14] Commonwealth v. Louisville, etc. Ry. Co., 80 Ky. 291. *Contra:* Sparhawk v. Union Pass. Ry. Co., *supra*.
[15] 45 Ark. 347, 55 Am. Rep. 555.

above, quotes from a case at that time, but recently tried in the classic precincts of Boston, in the Superior Court of that city, when a contrary opinion seems to have prevailed, at least when the shop was run in connection with an hotel, and the work was done for guests of the hotel. Here is an extract: "If a person opens his shop on the Lord's day merely for the sake of doing work for the comfort, cleanliness and convenience of others, like cutting their hair and shampooing, I should say it is a work of necessity and charity, and that the barber is not indictable for doing this in good faith."[16]

It was said in Stone v. Graves,[17] that it could not be held, as a matter of law, that the work of shaving an aged and infirm person, in his own house, on the Sabbath, is not of work of necessity. The Supreme Court of Indiana, in an early case,[18] appellant had been convicted of desecrating the Sabbath by following his usual avocation on that day. The evidence showed that defendant was a clerk and book-keeper in a hotel, which kept a cigar stand, usually attended by another person in the absence of whom the defendant sold the cigars for which he was indicted. The court held that the facts did not warrant conviction, and say "there is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar, by those who have acquired the habit, or continuing any other lawful habit on Sunday, the same then as on a week day, and whatever is necessary to do on Sunday to support this constant daily need, is a work of necessity within the meaning of the law. It is not unlawful to keep an hotel on Sunday in the same way it is usually kept on a week day, and if an hotel keeps a cigar stand, which is a part of the establishment, from which it sells cigars to its guests, boarders and customers on a week day, to sell cigars from the same stand, in the same way, on Sunday, is not unlawful." It is lawful to make necessary repairs on a railway track Sunday, in order to avoid delaying trains on week days.[19] Loading, unloading and sailing vessels may be works of necessity in certain cases.[20] And the same court permitted a person to be driven to church in his own carriage in the case of Commonwealth v. Nesbit.[21] At one time the good people of Philadelphia and vicinity could not lawfully get their ices on a Sunday, no matter what might be the atmospheric pressure.[22] But this deprivation was too much for the Quakers, and hence the opinion in Commonwealth v. Bosch.[23] Cigars were also included with ice cream in this construction.

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[16] For *contra* finding see Phillips v. Innis, 4 Clark & F. 234; Commonwealth v. Dexter, 143 Mass. 28.
[17] 145 Mass. 353.
[18] Carver v. State.
[19] Yonoski v. State, 79 Ind. 393; Phil. Wilm. & Balt. Ry. Co. v. Lehman, 56 Md. 209.
[20] See Phil. etc. Ry. Co. v. Steam Towboat Co., 23 How. 219.
[21] *Supra.*
[22] Commonwealth v. Burry, 5 Pa. Co. Ct. R. 481.
[23] 15 Weekly Note Cases, 316 (Pa.)

CORPORATE LIABILITIES—CONTRACT MADE BEFORE INCORPORATION — RATIFICATION BY PRESIDENT—QUESTION FOR JURY—CONTRACT AGAINST PUBLIC POLICY.

OAKES V. CATTARAUGUS WATER CO.

Court of Appeals of New York, November 2, 1894.

1. Where a company was organized to construct water-works and furnish water to a city, and the president was put in charge of the work of construction, and was on the spot, directing operations, he presumbly had power to employ men to secure rights of way, rentals for hydrants, and other privileges necessarily pertaining to the business.

2. Where the president of a corporation ratifies for its benefit a contract for services to be rendered to the corporation, made by him while acting as a promoter thereof, and such services are performed for the corporation, and the contract providing therefor is one which would have bound the corporation if made by the president after it had acquired a legal existence, the corporation is bound by the contract.

3. A contract by which plaintiff agreed to refrain from forming a corporation for the construction of water-works in a certain city, and from carrying on or prosecuting such work, in order that defendant might incorporate for that purpose, and conduct the business without competition, is not void as against public policy.

4. In an action against a water company on a contract made by its president, before incorporation, for services to be rendered to the corporation, which was ratified by him after incorporation, while he was in charge of the company's works, by a request for performance, and, after performance, by an acknowledgment of indebtedness and a promise to pay it, the question whether it was intended by the parties that such ratification should bind the company is for the jury.

O'BRIEN, J.: The trial court nonsuited the plaintiff, and the principal question presented by the appeal is whether there was proof made which should have been submitted to the jury. The plaintiff made a request to that effect, which

was denied, and an exception taken. The defendant is a corporation organized under the provisions of chapter 737 of the Laws of 1873, and the acts amendatory thereof and supplementary thereto, for the purpose of supplying the village of Cattaraugus with water. The certificate of incorporation was executed on the 3d day of March, 1890, but not filed in the proper office until the 19th day of May following, at which date it is assumed on both sides that the defendant's corporate existence begun. The statute requires the consent of the town authorities of the town, where the operations of the corporation are to be carried on, as a preliminary condition of its creation, and this was procured by the parties promoting the organization of the defendant on the 22d day of February, 1890. The application for this consent was in writing, signed by the seven persons who afterwards became the incorporators, and bears date February 5, 1890, and proves that at that date, if not before, they intended, in case the application was granted, to form the corporation. One George N. Cowan, an attorney at law, seems to have been the principal promoter of the whole enterprise. His name appears first upon the written application to the town authorities for the consent, and in the certificate of incorporation, and is followed by that of his wife and brother, with four other persons. Upon the organization of the defendant, he and his wife and brother became, respectively, the president, secretary, and treasurer of the corporation. This action was brought by the plaintiff to recover the sum of $1,000 upon a written agreement bearing date February 18, 1890, signed by the plaintiff and by Cowan as an attorney for the defendant. The plaintiff's difficulty in the case arises from the fact that this paper was executed, as will be seen from the dates, before the defendant had any corporate existence; and therefore, in its inception, it was not the defendant's contract, or binding upon it in any form. By the terms of the instrument the defendant agrees to pay to the plaintiff the sum of $1,000 for his services to defendant in securing right of way, hydrant rental, and placing investments, and things pertaining to the construction of the water-works for the village, to be paid at the completion of the work. It was further stated that unless the defendant constructed the works the agreement was to be considered and treated as null and void, but, if it did construct, then the plaintiff's services, for which the compensation was to be paid, should consist in aiding and helping the defendant in the matters above specified, without cash expense to him. It was shown at the trial that the defendant, in its corporate capacity, did construct and complete the system of waterworks for the village. The work was commenced about June, 1890, and completed before the commencement of this action. The defendant established an office in the village, and retained it while the work was in progress. Cowan was the president and manager of the business, and had full direction and charge; his wife acting as secretary, and his brother as treasurer, of the corporation. The plaintiff, upon the request of Cowan, the president, performed services for the defendant of the the kind and character described in the contract above mentioned. They do not appear to have been of a very important character, and no proof was given in regard to their value; but, so far as appears, he performed all that was required of him. After the completion of the water-works, Cowan, on several occasions, acknowledged the indebtedness to the plaintiff, and promised to pay it. There is no proof in the record tending to show that the general powers possessed by Cowan as the president of the defendant were limited or restricted by by-laws, or in any other way, and we must assume that he had all the power that the president and general managing agent of such a corporation could exercise in the transaction of the corporate business at the place where its operations were being conducted. The general powers of such an officer may be limited or restricted by the charter or by-laws of the corporation. These restrictions may not be binding on all persons dealing with the corporation under all circumstances, as secret and unknown instructions to a general agent of a natural person do not always bind persons dealing with the agent in ignorance of his actual powers. In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and *prima facie* he had power to do any act which the directors could authorize or ratify. Hastings v. Insurance Co., 138 N. Y. 473, 34 N. E. Rep. 289; Conover v. Insurance Co., 1 N. Y. 290; Booth v. Bank, 50 N. Y. 396; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. Rep. 363; Holmes v. Willard, 125 N. Y. 75, 25 N. E. Rep. 1083; Patterson v. Robinson, 116 N. Y. 193, 22 N. E. Rep. 372; Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379; Railroad Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110; Mor. Priv. Corp. §§ 251-253. There can be no doubt, I think, that the contract which is the basis of this action was of such a character, and the objects expressed upon its face were of such a nature, that the president and general manager of the enterprise had the power to make it in behalf of the corporation, whenever it attained a legal existence. The corporation had resolved to do the work, which was put in charge of the president, who was the principal promoter in organizing it. He was on the ground, directing the operations, and must be assumed to have the power to do whatever was necessary in executing the corporate objects. It cannot be doubted that he had power to employ engineers and workmen to construct the works, and to bind the company by contracts for labor and materials. He could also employ men to secure for the company rights of way, rentals for hydrants, and the other things necessarily pertaining to the business; and, if he could make contracts for that purpose, why could he not adopt and ratify one made by himself,

though before the corporation was legally created, but in anticipation of what subsequently occurred in obtaining the consent and filing the certificate of incorporation? We think this was fairly within his general powers, and if he intended, in behalf of the corporation which he represented, by calling upon the plaintiff to do the things which he had agreed to do in the writing, to adopt and ratify the agreement made before the corporation, instead of making a new one, and the plaintiff intended to and did perform for the corporation the things specified in the agreement, there is no good reason why the corporation did not become bound by his action. Whether this was the intention and purpose of the president of the defendant and of the plaintiff was, under the circumstances of the case, a question of fact, which should have been submitted to the jury. Ratification is largely a question of intention, to be determined from facts and circumstances as one of fact and the court was not warranted, under the circumstances, in disposing of the question as one of law.

But it is insisted that the contract, even if regarded as the corporate obligation, is void, as against public policy. There was proof given at the trial tending to show that the plaintiff, before entering into the contract with Cowan, contemplated an application in his own name to the town authorities for permission to form a corporation to construct the works, and that the purpose of the agreement was to compensate him for consenting to abandon the enterprise, and allow the defendant to obtain the consent, and reap the benefit of the enterprise. It is alleged in the complaint that, at the time of entering into the agreement, it was understood and agreed between the parties that, in addition to the consideration mentioned in the writing for the payment of the $1,000, the plaintiff was not to prosecute or carry on the business for which the defendant was subsequently organized, and was not to organize any corporation for that purpose, or to ask or receive a franchise from the town authorities for that purpose. It was further alleged that the plaintiff kept and performed these conditions, which were not expressed in the writing, but fully understood between the parties, but did assist Cowan in his efforts to accomplish the purpose originally contemplated by the plaintiff. These allegations are, however, put in issue by the answer. The proof would have justified a finding by the jury that the plaintiff's promise to abandon the enterprise, and leave the field open to Cowan and his associates, was an element that entered into the contract, and an inducement to its execution. No such purpose, however, appears upon the face of the contract. The consideration there expressed for the payment of the money was services which the plaintiff could lawfully perform, and which it is claimed he did perform, for the defendant. The court was not warranted in holding, as a matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for a purpose other than that stated upon its face. If that question was in the case at all, it was one for the jury, as the evidence was not conclusive, but open to different inferences. But we think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes, or in restraint of trade, or to influence the action of public officials. Assuming that both the plaintiff and Cowan intended to apply for the franchise, and that the latter persuaded the former to abandon his purpose, and aid him in the manner mentioned in the contract, for the consideration promised, there was nothing immoral, or that threatened the public interests or the public good, in such an arrangement. If the business of a private individual or corporation is threatened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business, at a stated compensation. Such an agreement, fairly entered into, is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy. Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. Rep. 363; Tode v. Gross, 127 N. Y. 480, 28 N. E. Rep. 469; Thermometer Co. v. Pool, 51 Hun, 157, 4 N. Y. Supp. 861; Cameron v. Water Co., 62 Hun, 269, 16 N. Y. Supp. 757. For these reasons the judgment should be reversed, and a new trial granted; costs to abide the event.

NOTE.—Judges Gray and Finch in a dissenting opinion antagonize the conclusion of the majority of the court. They regard the decision as a dangerous innovation on existing law. If, at the time the agreement set forth in the complaint was made, there had been such a corporation as the Cattaraugus Water Company, then, in the opinion of Judge Gray, it would be quite conceivable that there might be a ratification by it of the act of a person standing in the relation to it of an officer or agent. Ratification presupposes the doing of an act by an agent which a principal could have authorized. It is defined as an agreement to adopt an act performed for us by another and is equivalent to an original authority to do the thing in question. But here Cowan the promoter represented no one but himself. He and others were proposing to associate themselves in a corporate project. He was a mere promoter and he had no principal. When the plaintiff entered into the agreement with Cowan he was bound to inform himself as to whether the latter represented an actual principal. If he neglected to do so his agreement was worthless, except so far as it imposed upon Cowan individually a liability for undertaking to act with no responsible principal behind him. Though there may have been evidence upon which a jury might have found there was ratifi-

cation if there had been a contract made for the company, but it ought to be manifest, says Judge Gray, that unless there had been *in esse* a corporation *de facto* or *de jure* which could have made Cowan its attorney or agent there could not be such a thing as a ratification. The rule is stated in Morawetz on Private Corporations, § 547, as follows, viz: "A corporation is not responsible for acts performed or contracts entered into before it came into existence, by promoters or other persons assuming to bind the company in advance." Again, at section 549, the author says that "a corporation cannot be charged with the acts or contracts of its promoters by virtue of the technical doctrine of ratification. This doctrine applies only to acts performed on behalf of an existing principal." These statements are amply borne out by the authorities cited by the author, and are in the view of Judge Gray founded in clear reason. And see Railroad Co. v. Magistrates of Hellensburgh, 2 Macq. H. L. Cas. 391, 409. There may, however, be an adoption of agreements made by promoters of companies by a formal acceptance, or if it is a case where the members of the corporation would be chargeable with knowledge of the contract, and had knowingly received the benefit of an engagement entered into by promoters, adoption might be implied. The adoption of such an agreement by a corporation is equivalent, of course, to the creation of a new agreement, and is governed by all the rules applicable to the formation of a contract under the common law. 1 Mor. Priv. Corp. § 549. There does not seem to be any authority for holding that adoption in such a case of a written contract could rest in implication from the mere statements or acts of the interested party who made it, with no evidence to show any knowledge or acquiescence on the part of any other officer or member of the corporation. "Any other view would be a most hazardous one to take for the interests of shareholders in corporations." Assuming that a corporation may become obligated by a contract made for it before its incorporation, through acceptance or adoption, it should at least appear, in order to justify a verdict from the facts that those facts established a knowledge by its agents of its existence and of its terms or that the benefits, the acceptance of which is relied upon to constitute adoption were of that nature as to presuppose and to charge the company or its agents with knowledge of a contract with the person from whom derived. The dissenting judge calls attention to the fact that in this case it is not proved that there was any formal or official action upon the agreement or that any of the directors knew of such outside of Cowan himself. There was nothing which amounted to a representation by the defendant to plaintiff that the contract was subsisting and valid. Wilson v. Railway Co., 2 De Gex J. & S. 491. The plaintiff rests his action solely upon the obligation which the agreement set forth imposed upon the defendant and if, as it is conceded, there could have been none imposed at the time it could never have become one in the absence of an adoption of an agreement.

Whatever view might be taken of the relation of such a contract to public policy, the position of the court on the abstract question involved is, as the *New York Law Journal* commenting on this case remarks, logical; and it is doubtful whether much substantial protection to shareholders would in the long-run result from specially requiring a vote of the board of directors in all cases of ratification as distinguished from the original making of contracts.

CORRESPONDENCE.

THE PECULIAR DECISION OF UNITED STATES JUDGE PARKER.

There appeared recently in the CENTRAL LAW JOURNAL (39 Cent. L. J. 275), a decision of Judge Parker of the United States District Court, for the District of Arkansas, which is peculiar indeed, and it is apt to attract the attention of all lawyers, and possibly of non-professional gentlemen. In this decision he sets aside and disregards an order of the Supreme Court of the United States, the highest judicial tribunal of the country, which is not only a new ruling to me, but a remarkable departure from the well-established course of judicial proceedings of all countries. There is no dispute about the facts, they are simple and plain, and are as follows: A man by the name of Hudson was convicted in Judge Parker's court at Ft. Smith, of an assault with intent to kill, and was sentenced to prison for a term of four years. He applied to Justice White of the Supreme Court for a writ of error to operate as a *supersedeas*. The writ was granted and the defendant admitted to bail in the sum of $5,000, and an order signed by Justice White to the effect that the sufficiency of the bond be subject to the approval of Judge Parker. The bond ordered by Justice White was simply to secure the appearance and attendance of the defendant whenever and wherever he may be required to appear. The bond was presented to him for approval, but was rejected by Judge Parker, he holding that the order of Justice White was unauthorized and that the Supreme Court has no right, either by the constitution, the common law, or of any federal statute, to admit a defendant to bail, after conviction and pending an appeal; that congress has not provided for bail being taken in such cases, and therefore any order for taking of such bail by any court is accordingly invalid, and therefore the order made by Judge White he holds is invalid, and for this reason refuses to approve the bond. It is with much diffidence I essay to criticise a decision of so learned and distinguished a jurist as Judge Parker, and it is particularly so, as that decision has been emphasized by an able editorial in the CENTRAL LAW JOURNAL. But believing as I do, that the learned judge has made, not only a grave mistake, but has also set a wrong and dangerous precedent, I feel constrained to suggest, in my humble and feeble way, wherein the decision is erroneous, and wherein lies the danger of the precedent. In the discussion of this subject, however, it will be taken for granted that the Supreme Court did not err in making the order, as the question of whether it did or not, does not, cannot enter into the question for consideration, and will not be considered; the real question is one of greater importance. The constitution of the United States providing for the establishment of courts of justice, and the acts of congress providing the means for carrying into effect such constitutional provision, all provide for a court of last resort and final determination from which there can be no appeal, and to which all inferior courts owe unquestioning obedience. Its decision being final, become the supreme law of the land whether they are in accord or not, with its former rulings and opinions. That court is the Supreme Court of the United States, to which the case under consideration had been taken from Judge Parker's court, by writ of error. All human beings are liable to error, but such a court is a wise and necessary institution, in order to give stability to the decisions of our courts, and the laws of the country, and thereby command that respect necessary to in-

sure prompt obedience, and enforcement of the laws, and make the citizen secure in his personal and property rights. It is also a well understood and familiar principle of law, that a court from which an appeal has been taken and perfected, has no further jurisdiction over the case, and all that it can legally and properly do in the case thereafter will be to obey the mandates of the Appellate Court. And in obeying such mandates, the acts of the inferior court are more the acts of a ministerial officer than of a judicial character. In the case under consideration, the writ of error, to act as a *supersedeas*, had been granted; in other words, the appeal had been perfected, except the mere act of approving the bond, which Judge Parker was ordered to do, provided always, the bond was sufficiently formal and financially good. These two questions of the formality of the bond, and its financial soundness, were the only questions submitted to Judge Parker, and the only ones upon which he could legally pass. He could not then, within his own legitimate authority, either admit the defendant to bail, or refuse him bail, as the case had passed out of his jurisdiction. The bond was duly executed and presented to him for his action thereon. No exceptions were taken as to its formality or financial soundness, but it was rejected and the defendant refused bail, on the sole ground that the order of the Supreme Court admitting him to bail was unauthorized, the Supreme Court having no right (authority), he holds, either by the constitution, the common law, or any federal statute, to admit a defendant to bail, after conviction and pending an appeal. It seems strange that that court should have been so ignorant of its jurisdiction and powers. The case does not furnish any information as to where the alleged crime was committed, whether in Arkansas or in the Indian Territory, over which that court has jurisdiction, nor of the provisions of the statutes of that State and Territory in regard to letting to bail, which would be of some value on the question. But waiving all of these minor questions and considerations, let us consider the only question which properly enters into the consideration of the case, remembering that Judge Parker's decision was, in effect, an overruling or reversal of an order of the Supreme Court. Neither the constitution, the common law, the federal statutes, nor any State statutes authorize the judge of an inferior court, from which an appeal has been taken, to hold that an order of the Appellate Court in regard thereto is unauthorized; in other words, that the Appellate Court has exceeded its jurisdiction, that its order is null and void, and not entitled to obedience from the inferior court.

If the inferior courts possessed such authority and power, of what use would the appellate courts be? If such were the rule, it would be an anomaly, not to be found in the laws and jurisprudence of the United States, at the present time, nor any time in the past. Then, the question, and the only question in the case now, and at all other times, is, where did Judge Parker get his authority for reviewing and annulling the order of the Supreme Court to let the defendant to bail? There can be but one answer to this question, and that is, he did not have any such authority. Then, if he had no such authority, his order refusing to approve the bond is not only a nullity, but he himself becomes thereby a violator of the law he is sworn to maintain and enforce. It will not do to say that he so held and acted that the defendant might not be released on a bond which could not be enforced if forfeited. That was not his lookout, and there, as has been seen, he had not any legal authority for correcting the mistake if such mistake had been made by the Supreme Court, which is not admitted to be the fact. But further, if the judge of the District Court may assume such authority and hold that the Supreme Court exceeded its jurisdiction and made an unauthorized order, and on that ground disobey that order with impunity, why may not any other inferior court pursue the same course, when dissatisfied or displeased with any order or judgment of the Appellate Court, to which its own decision and rulings have been taken for review and correction, or why may not any private individual, hold any judgment against him to be null and void, and for that reason disobey it and prevent its enforcement? The danger of such a precedent can be readily seen, and it becomes still more dangerous, when it comes from such high authority. If such were the rule, there would be no certainty or force in the decisions of the courts, all respect for them would soon disappear, obedience to their decisions could not be enforced, might would have to be accepted as the rule of right, anarchy would reign supreme, justice would be driven from the land, and safety of person and property would be a mere myth. If error had been committed by the Supreme Court in admitting the defendant to bail, the utmost harm which could result from such error would be that the defendant might be guilty and escape punishment, and possibly evade the payment of his voluntary bond, also. But that would be better than open disobedience and defiance of an order of the Supreme Court. And while there is no desire whatever to have Judge Parker punished or suffer harm for his assumption of authority and disobedience of the order, by doing what he probably thought was his right and duty to do. Yet, in order to secure proper respect for, and prompt obedience to the laws, and the decisions of our courts, it is to be sincerely hoped and trusted that the Supreme Court of the United States will see to it that its order to let the defendant to bail is properly obeyed, and the bond be approved, if there is no valid objection to it.

St. Louis, Mo. D. M. McKENNEY.

BOOKS RECEIVED.

The American and English Encyclopædia of Law Compiled under the Editorial Supervision of Charles F. Williams. Vol. XXVI. Northport, Long Island, N. Y.: Edward Thompson Company, Law Publishers. 1894.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. XXXIX. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1894.

American Railroad and Corporation Reports. Being a Collection of the Current Decisions of the Courts of Last Resort in the United States, Pertaining to the Law of Railroads, Private and Municipal Corporations, including the Law of Insurance, Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and Annotated by John Lewis, Author of "A Treatise on Eminent Domain in the United States." Volume IX. Chicago: E. B. Myers & Company, Law Publishers. 1894.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Accounting by Executors.—An executor will be allowed for sums paid by the will for repairs to a summer hotel, which by the will he was directed to sell, if the expenditures were judiciously made and were necessary to make the property marketable at a fair value or to secure rentals from it until it became possible to sell it.—ALMY V. PROBATE COURT OF NEWPORT, R. I., 30 Atl. Rep. 458.

2. ADMINISTRATOR — Claims — Application of Collaterals.—Money received from the sale of collaterals given by the deceased as security for any debt, which has been fully allowed as a claim against his estate, operates as a part payment of the claim, and, where such estate is insolvent, its assets should be apportioned among its creditors according to their statutory classes, on the basis of the amounts severally due them at the time of the apportionment.—JAMISON V. ADLER-GOLDMAN COMMISSION CO., Ark., 28 S. W. Rep. 35.

3. ADMIRALTY JURISDICTION—Remnants and Surplus.—Upon a default in a mortgage, before the appointment of a receiver, a mortgagee of a vessel has such a vested legal interest in the vessel mortgaged as entitles him to maintain a petition in admiralty for the remnants and surplus after a sale, as against the receiver of the shipowner seeking to draw all litigation concerning the mortgages into the State court.—THE ADVANCE, U. S. D. C. (N. Y.), 63 Fed. Rep. 704.

4. ADOPTION—Petition — Residence. — On collateral attack, an order of the Probate Court for the adoption of a child on a record which does not disclose the child's residence, as required by the act of February 25, 1885 (which provides that any person desirous of adopting a child may file his petition in the Probate Court in the county in which such child resides, specifying where the child's father and mother, if living, reside), is void.—MORRIS V. PENDERGRASS' ADM'R, Ark., 28 S. W. Rep. 30.

5. ADVANCEMENTS—What Constitute.—A conveyance by a mother to her son, for an expressed consideration, is not an advancement, within Pub. St. ch. 187, § 20, defining advancements, though no consideration passed when the conveyance was made, but the son turned over his earnings to the mother, with whom he lived for 17 years after coming of age, and had cared for and improved the property in question during that time.—BEAKHUST V. CRUMBY, R. I., 30 Atl. Rep. 453.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignee is not liable for goods lost since the assignment, where he did not appropriate any of the goods, or the money received therefor, or knowingly allow others to do so.—IN RE JOSLIN, Mich., 60 N. W. Rep. 762.

7. ASSIGNMENT FOR CREDITORS — Reservation of Homestead.—An assignment for the benefit of creditors with preferences, which conveys all the assignor's land, but claims that a certain part of the land is exempt as a homestead, is not invalid because such land is not a homestead, the claim being made in good faith.—BAKER V. BAER, Ark., 28 S. W. Rep. 28.

8. CARRIERS OF PASSENGERS — Damages. — Where plaintiff, a traveling salesman, received as compensation a certain salary, his railroad expenses, and a certain percentage of the amount of his sales, such percentage is not "profits," in the sense of that word as used in the decisions discussing the right to recover profits as such in actions for breach of contract; and, in an action for damages sustained from having received personal injuries, plaintiff may recover such percentage, and, in order to lay a foundation for such recovery, may show the extent and amount of his ordinary business. — RIO GRANDE WESTERN RY. CO. V. RUBENSTEIN, Colo., 38 Pac. Rep. 76.

9. CONFLICT OF LAWS—Sale of Decedent's Effects.—As, in the absence of evidence to the contrary, the law of a foreign country is presumed to be the same as the law of California, one who purchases notes from an executor appointed by an English court, and fails to show that under the English law the executors had power to sell the notes, must show that they were sold in accordance with Code Civ. Proc. § 1517, which requires a sale of any property of a decedent to be authorized by an order of the superior court.—WICKERSHAM V. JOHNSON, Cal., 38 Pac. Rep. 89.

10. CONSTITUTIONAL LAW—Obligation of Contracts—Limitations.—The amendment of February 13, 1885, to Pol. Code, § 3788, providing that, "where land has been heretofore sold for delinquent taxes, the deed therefor must be made within one year and three months after this act takes effect, and, unless so made, the purchaser shall be deemed to have relinquished all his rights," does not impair the obligation of contracts.—TUTTLE V. BLOCK, Cal., 38 Pac. Rep. 109.

11. CONSTITUTIONAL LAW—Statutory Regulation by States.—A State statute requiring every person selling fruit trees or other nursery stock grown outside the State to file an affidavit with the secretary of State, and a bond of $2,000, and to exhibit to each purchaser a certificate of the secretary that he has complied with these provisions (Laws Minn. 1887, ch. 196, §§ 1-3), is unconstitutional, as imposing vexatious and annoying restrictions upon interstate commerce (article 1, § 8, cl. 3), and cannot be upheld on the ground that it is intended to protect the citizens of the State from the fraudulent representations of such dealers.—IN RE SCHECHTER, U. S. C. C. (Minn.), 63 Fed. Rep. 695.

12. CONSTITUTIONAL LAW—Taxation of Brokers.—Imposing a brokerage tax upon two designated classes of brokers does not contravene the constitution of 1874, which provides that taxation shall be uniform upon the same class of objects within the territorial limits of the authority levying the tax. — CITY OF PITTSBURGH V. COYLE, Pa., 30 Atl. Rep. 452.

13. CONTRACT—Sale of Land—Specific Performance.—A contract providing for the conveyance of certain wild land on payment of a certain price stipulated that the obligee on payment of a certain sum per acre, for not less than 20 acres, should be entitled to a deed to such portion of the land. In accordance with the last provision, a part of the land was conveyed, and payments were made, entitling the obligee to a conveyance of thirty acres more: Held that, though default

had been made in the payment of the full purchase price, specific performance of a conveyance as to the 30 acres should be enforced, without compelling payment of the unpaid balance.—BOWER v. BAGELEY, Wash., 38 Pac. Rep. 165.

14. CONTRACT—Specific Performance.—An oral contract will not be enforced where plaintiff's testimony as to the amount to be paid is denied by defendant, and is not corroborated.—ECKEL v. BOSTWICK, Wis., 60 N. W. Rep. 784.

15. CONTRACT BY WIFE—Separate Estate.—Where a married man makes application for life insurance, and his wife in the absence of the husband, agrees to take the policy on condition that it be made payable to her, and gives her note in payment of the first premium, her separate estate is charged with its payment.—MITCHELL v. RICHMOND, Pa., 30 Atl. Rep. 486.

16. CONTRACT OF CITY—Estoppel.—The maker of a note to a municipal corporation is estopped from denying the power of the corporation to loan the money for which the note was given.—SCHEUSSLER v. TOWN OF MASON, Tex., 28 S. W. Rep. 42.

17. CONVICT—Appeal Bond.—Pub. St. ch. 248, § 52, which prohibits a convict from making a will or conveyance of property during his imprisonment, does not prohibit him from giving bond on appeal by him from a judgment of the Probate Court affecting his property rights.—KENYON v. SAUNDERS, R. I., 30 Atl. Rep. 470.

18. CORPORATION—Authority of President.—One who was elected president of a corporation, and appointed its managing agent and attorney in 1877, and to whom no successor was ever elected or appointed, will, in 1893, be presumed to have authority, in the name of the corporation, to maintain an action in its behalf.—LUCKY QUEEN MIN. CO. v. ABRAHAM, Oreg., 38 Pac. Rep. 65.

19. CRIMINAL EVIDENCE — Dying Declarations. — Though the declarations of deceased are inadmissible at their first utterance, yet if he, being subsequently conscious that he is dying, reaffirms them, they are admissible as dying declarations.—STATE v. EVANS, Mo., 28 S. W. Rep. 8.

20. CRIMINAL LAW — Argument of Counsel.—On the trial of a defendant charged with selling liquor to a minor, the minor's mother testified without objection to his age, referring at the time to an entry of the day of his birth in the family Bible. His age was undisputed: Held, that the reading of such entry by the prosecuting attorney in his argument, though such entry was not in evidence, was no ground for reversal. —CAPRON v. STATE, Ind., 38 N. E. Rep. 491.

21. CRIMINAL LAW—Bail Bond—Authority of Clerk of Court.—A clerk of a court has no authority to take a bail bond, and a bond taken by him is not binding, though the court enter a *nunc pro tunc* order approving the same after the discharge of the prisoner.—STATE v. CALDWELL, Mo., 28 S. W. Rep. 4.

22. CRIMINAL LAW—Evidence of Grand Juror.—Testimony of members of the grand jury that brought the indictment is inadmissible to show the character of the evidence taken before them, for the purpose of disproving the identity of the case on trial with that on which the grand jury acted.—NEWMAN v. STATE, Miss., 16 South. Rep. 232.

23. CRIMINAL LAW — Murder. — Mere words of reproach, however grievous, unaccompanied by an assault or battery, do not constitute such provocation as to reduce a homicide from murder to manslaughter.—STATE v. MARTIN, Mo., 28 S. W. Rep. 12.

24. CRIMINAL LAW — Receiving Stolen Goods. —One who receives goods under an arrangement that they were to be stolen in a county other than that in which he was to receive them, and then shipped to him, is triable in the county from which they were shipped.—STATE v. HARIB, R. I., 30 Atl. Rep. 462.

25. CRIMINAL LAW—Recognizance — Scire Facias.—The validity of an indictment cannot be inquired into in proceedings under a writ of *scire facias* to show cause why a judgment against the bondsmen for breach of the conditions of a recognizance, entered into by the defendant under that indictment, should not be made absolute.—STATE v. MORGAN, Mo., 28 S. W. Rep. 17.

26. CRIMINAL LAW—View by Jury. — The extent to which the Circuit Court may go in ordering a view by the jury in a criminal case is to direct a view of the premises, where a crime is supposed to have been committed, by the jury. The defendants and counsel for the respective parties may be permitted to accompany them, and some person selected by the parties, or named by the court, may accompany the jury to point the premises out to them. — GARCIA v. STATE, Fla., 16 South. Rep. 223.

27. DECEIT—Damages.—Where defendant sold plaintiff a stallion by means of false representations as to his breeding abilities, plaintiff, on recovering a verdict in an action for damages, can recover the cost of keeping the stallion a reasonable time for the purpose of testing him.—PEAK v. FROST, Mass., 38 Pac. Rep. 518.

28. DECEIT—Exchange of Land—Evidence.—In an action for deceit in the exchange of real estate, a declaration alleging that defendant knowingly made false representations of material facts, by which plaintiff was induced to make the exchange, is sufficient, since the jury may infer fraudulent intent.—BRADY v. FINN, Mass., 38 N. E. Rep. 506.

29. DEED—Construction.—Where land is conveyed to a trustee for the sole and separate use of a married woman, giving her full power to sell and convey the property, and it is provided that, in case she dies without disposing of the property by deed or will, the trust shall cease and determine, and the property shall revert to and vest in her husband, held that, on the death of the wife, the property being undisposed of, an equitable fee simple title to the land vested in the husband.—YORE v. YORE, U. S. C. C. (Mo.), 63 Fed. Rep. 645.

30. DEED OF WATER RIGHTS— Construction. — One who conveys land through which a stream flows by a deed which provides that it is intended to and does convey the right to lay a one-inch pipe so as to carry the running water from the stream to certain land of the grantee perpetually and forever, cannot afterwards, as the owner of adjoining land through which the stream flows, lay a pipe in the stream which will so divert the water as not to leave sufficient to fill the one inch pipe of the grantee.—YOCCO v. CONROY, Cal., 38 Pac. Rep. 107.

31. DESCENT AND DISTRIBUTION—Inheritance Tax.—The privilege of transmitting and receiving, by will or descent, property on the death of the owner, is a "commodity," within the meaning of this word in the constitution (part 2, ch. 1, § 1, art. 4), and an excise may be laid upon it.—MINOT v. WINTHROP, Mass., 38 N. E. Rep. 512.

32. EQUITABLE ASSIGNMENT.—An order by a landlord, on the agent who collected his rent, to pay the mortgagee of the property the rent collected, in payment of interest on the mortgage, is not an equitable assignment of the rent, and does not entitle the mortgagee to receive the rent, as against an assignee for the benefit of the landlord's creditors.—IN RE CLEARY, Wash., 38 Pac. Rep. 79.

33. EQUITY— Jurisdiction.—Equity will not take jurisdiction of an action to recover a simple debt on the ground that a pretended payment thereof was fraudulent.—CARY & MOEN CO. v. MOEN, Mass., 38 N. E. Rep. 505.

34. ESTOPPEL — Acquiescence.—Representations by the maker of a note, a clause in which has been erased since its execution, made after inspection of the note as altered, to an intending purchaser, that the note will be paid, will estop the maker from interposing the defense of alteration in an action thereon.—KROTHWOHL v. DAWSON, Ind., 38 N. E. Rep. 467.

35. ESTOPPEL—By Representations.—A recital, in a

sealed contract of sale of a business, that no representations in regard thereto had been made, does not preclude the party misled by the fraudulent representations of the other from proving the same.—BRIDGER v. GOLDSMITH, N. Y., 38 N. E. Rep. 458.

36. ESTOPPEL—Silence.—Where a wife, on being told by a mortgagee that her husband has given a mortgage on a horse which in fact belonged to her, to secure his debt, makes no claim thereto, she is estopped to assert her title as against the mortgage.—RICHARDSON v. TOLIVER, Miss., 14 South. Rep. 218.

37. EVIDENCE—Declarations of One in Possession.—On an issue as to whether deceased executed a deed of certain property, reserving therein a life estate to herself, declarations made by her after the alleged date of the deed, while in possession of the property, and in the absence of defendants, as to the character of her possession, are not admissible.—ROBBINS v. SPENCER, Ind., 38 Pac. Rep. 522.

38. EXPERT EVIDENCE.—An expert witness may testify as to whether a person standing on the floor can detect any oscillation in a shaft 2 15-16 inches in diameter, and 11 feet above the floor, due to its not running true.—OUILLETTE v. OVERMAN WHEEL CO., Mass., 38 N. E. Rep. 511.

39. FEDERAL COURTS—Injunction—Pleading.—A bill for an injunction restraining defendants from further issuing a certain circular alleged to be detrimental to complainant's business, and from in any way interfering with that business by threats, etc., which does not contain any statement of the amount of damages sustained or apprehended, or of the value of the matter in controversy, or of the object sought to be obtained, is not sufficient to give the court jurisdiction.—HOME INS. CO. OF NEW YORK v. NOBLES, U. S. C. C. (Pa.), 63 Fed. Rep. 641.

40. FEDERAL OFFENSE—Consolidation of Indictments—National Bank.—Under Rev. St. U. S. § 1025, providing for consolidation when there are several charges against one person for two or more of the same class of crimes in two or more indictments, four indictments containing counts charging a bank officer with making a false report to the comptroller of the currency, and in making false entries in the books of the bank, may be consolidated.—UNITED STATES v. FOLSOM, N. Mex., 38 Pac. Rep. 70.

41. FRAUDS, STATUTE OF—Resulting Trust.—An agreement by a mortgagee, with the wife of the mortgagor, that if she will join in the mortgage, and not contest the foreclosure, or redeem from the sale, he will purchase the land, and, on reselling the same, will pay her a certain portion of the proceeds, does not create a "trust concerning land" (Rev. St. 1894, § 3391; Rev. St. 1881, § 2969), nor is it a conveyance of a trust in "goods or choses in action" (Rev. St. 1894, § 6631; Rev. St. 1881, § 4906), so as to render it unenforceable unless in writing.—TALBOTT v. BARBER, Ind., 38 N. E. Rep. 487.

42. FRAUDULENT CONVEYANCES.—Relationship of the parties to a sale of personal property as father and son is not necessarily a badge of fraud.—BLEILER v. MOORE, Wis., 60 N. W. Rep. 792.

43. FRAUDULENT CONVEYANCES—Deed by Husband to Wife.—A husband soon after engaging in business and contracting debts, deeded land worth $4,300 to his wife, to satisfy a pretended debt of $1,600. He then had no other property subject to execution. He also gave her a mortgage for $1,000, which she claimed she loaned him, and most of which was money saved from funds he let her have for housekeeping purposes: Held, that such deed was fraudulent as to existing and subsequent creditors of the husband.—GABLE v. COLUMBUS CIGAR CO., Ind., 38 N. E. Rep. 474.

44. GUARANTY—Fraud.—A guaranty secretly executed in favor of one creditor, to enable a debtor to effect a composition with all of them, is invalid for fraud, and the guarantor may set up that fraud in an action on the guaranty.—MORRISON, PLUMMER & CO. v. SCHLESSINGER, Ind., 38 N. E. Rep. 493.

45. HIGHWAYS—Law of the Road.—Gen. Laws, ch. 75, § 11, requires a person traveling with a vehicle, meeting another person so traveling on a highway, to turn to the right of the center of the traveled part of the road, "so as to enable such person to pass with his vehicle without interference:" Held, in an action for a collision on a highway, where it appeared that there was sufficient room for both to pass, and that the collision could have been avoided if plaintiff had exercised due care, he could not recover, though defendant did not turn to the right.—BREMBER v. JONES, N. H., 38 N. E. Rep. 411.

46. HIGHWAY—Vacation.—Damages are not recoverable for the vacation of a portion of a highway used by petitioner in passing from one portion of her lands to another, where no part of such lands abuts on the portion of the highway.—NICHOLS v. INHABITANTS OF RICHMOND, Mass., 38 N. E. Rep. 501.

47. HOMESTEAD—Attempt to Incumber.—Knowledge by the agent of a loan company that an ostensible sale and conveyance of a homestead is merely colorable, and for the purpose of enabling the owners to raise money thereon by discounting the notes for the deferred payments with the loan company on the faith and security of the resulting vendor's lien, is not imputable to the company itself when the whole transaction is arranged by collusion between the agent and the owners for the purpose of perpetrating a fraud upon the company; and in such case the company is entitled to rely upon the vendor's lien.—WESTERN MORTG. & INV. CO. v. GANZER, U. S. C. C. of App., 63 Fed. Rep. 647.

48. HOMESTEAD—Business Homestead—Intention.—A mere intention to use property for the purpose of a homestead, though entertained in good faith, will not constitute it the homestead, as against a person dealing with the owner in relation thereto, without knowledge on his part of such intended use of the property, but such intention must be indicated by acts of such clear and definite import as will amount to notice to such person.—WOLF v. BUTLER, Tex., 28 S. W. Rep. 51.

49. HOMICIDE.—The conviction of one of two persons jointly indicted for manslaughter committed by means of abortion is not evidence tending to show the other's guilt.—STATE v. BOWKER, Oreg., 38 Pac. Rep. 124.

50. INJUNCTION—Threatened Criminal Prosecution.—Injunction will lie to restrain a county board from interfering with the employees of a railroad company engaged in fencing its right of way, where the board threatens to prosecute the persons engaged in building the fence for obstructing a public road, the existence of which the railroad company denies.—PUEBLO & A. V. R. CO. v. BOARD OF COM'RS OF PROWERS COUNTY, Colo., 38 Pac. Rep. 112.

51. INSOLVENCY—Insolvent Bank—Estoppel.—Where a creditor of an insolvent bank, entitled to a preference, files his claim as a general creditor, without asserting his preference, if the rights of the other creditors are not thereby impaired he is not estopped from afterwards receiving such preference. — HUNT v. SMART, Tex., 28 S. W. Rep. 63.

52. INSURANCE — Lightning and Wind. — Under a policy covering direct loss from lightning, but excluding loss from wind, there can be no recovery for damage by wind, though, but for the weakening, of the building by lightning, it would not have been blown down.—BEAKES v. PHOENIX INS. CO. OF HARTFORD, N. Y., 38 N. E. Rep. 453.

53. INSURANCE—Property "Held in Trust."—An agent employed to manage a store, carrying on the business in his own name, who is required to keep an account of all the transactions, to account to his principal for the profits whenever requested so to do, and to turn over all the property at the end of his employment, holds the property of his principal "in trust," within the meaning of an insurance policy on goods so held.—ROBERTS v. FIREMAN'S INS. CO. OF CHICAGO, Penn., 30 Atl. Rep. 450.

54. JUDGMENT — Assignment — Suit to Rescind. — Though the owner of a judgment has been deceived as

to its validity and value by third persons, one is guilty of fraud who obtains an assignment of it for an inadequate consideration, knowing that his assignor was thus deceived, and being able from his own knowledge to inform him of material facts affecting the value of the judgment.—TEXAS ELEVATOR & COMPRESS CO. v. MITCHELL, Tex., 28 S. W. Rep. 45.

55. JUDICIAL NOTICE—Courts.—Courts will take judicial notice of the boundaries of a county, under Code Civ. Proc. § 1875, providing that the courts will take judicial notice of "whatever is established by law."—ROGERS v. CADY, Cal., 38 Pac. Rep. 81.

56. LANDLORD— Dangerous Premises.— In an action against a landlord for injuries to a child by the breaking of a platform used for hanging out washing, where it appeared that the platform was in the same condition when the accident occurred, as when plaintiff's father hired the house as it was, and that its defects could have been discovered by him by exercising reasonable care, plaintiff cannot recover.—MOYNIHAN v. ALLYN, Mass., 38 N. E. Rep. 497.

57. LEASE OF OIL LAND — Assignment. — One who leases oil land under an agreement to pay a certain sum for each oil well drilled is not released from liability for the rent by his assignment of the lease to another person, whom the lessor recognizes as his tenant.—PITTSBURG CONSOLIDATED COAL CO. v. GREENLEE, Penn., 30 Atl. Rep. 489.

58. LIFE INSURANCE—Recovery of Premiums.—Where a policy was issued by defendant on the life of plaintiff's husband, without his knowledge, but on the solicitation of defendant's agent, and in a manner contrary to defendant's rules, if plaintiff was innocent of any fraud, and was induced by the fraudulent representation of the agent to make the application, plaintiff may rescind the contract on discovering the fraud, and recover the premiums paid.—FISHER v. METROPOLITAN INS. CO., Mass., 38 N. E. Rep. 503.

59. LIFE INSURANCE POLICY—Conditions.—One of the stipulations in a life insurance policy was that "no assignment of this policy shall be valid unless made in writing indorsed hereon, and unless a copy of such assignment shall be given to the company within 30 days after its execution:" Held that, this provision not being one which goes to the essence of the contract, but being merely designed to protect the insurer against the danger of having to pay the policy twice, by requiring evidence of a change of beneficiaries to be put in reliable form, and promptly furnish to the company, no one but the insurer can avail himself of a non-compliance with it.—HOGUE v. MINNESOTA PACKING & PROVISION CO., Minn., 60 N. W. Rep. 812.

60. LIMITATIONS—New Promise.—A promise to pay in installments a debt barred by the statute of limitations does not remove the bar, so as to enable the creditor to immediately sue thereon.—WILEY v. BROWN, R. I., 30 Atl. Rep. 464.

61. MALPRACTICE — Pleading.— To state a case of malpractice against a physician, it is not necessary to allege that it was his duty to act skillfully, but this will be implied from his employment as a physician.—JONES v. BURTIS, Wis., 60 N. W. Rep. 785.

62. MANDAMUS — Estoppel—Trying Title to Office.—The institution of proceedings in *quo warranto* by one previously in possession of the office of sheriff, against one claiming under appointment by the governor, is an admission of the possession and use of such office by the latter, precluding a denial thereof in a subsequent proceeding in *mandamus* by the latter for the possession of the books and property pertaining to the office.—CONKLIN v. CUNNINGHAM, N. M., 38 Pac. Rep. 170.

63. MANDAMUS — Inability to Obey.—*Mandamus* will not issue unless it clearly appears that the defendant has the absolute power to obey it; and where a street railway company neglects to pave the street between its rails, as agreed, and excuses itself on the ground of an absolute lack of funds and credit, a writ of *mandamus* directing it to lay such pavement will not issue.—CITY OF BENTON HARBOR v. ST. JOSEPH & B. H. ST. RY. CO., Mich., 60 N. W. Rep. 758.

64. MARINE INSURANCE.—In an action on a marine policy on merchandise, the question whether a sale by the master of the merchandise was due to the perils of the sea depends on whether a reasonably prudent man would, under the circumstances, have deemed it necessary to sell the goods.—MEYER v. GREAT WESTERN INS. CO., Cal., 38 Pac. Rep. 82.

65. MASTER AND SERVANT — Assumption of Risk.—A brakeman killed, while riding in front of an engine, by a collision with a wagon, caused by failure to maintain gates or signals at a crossing, must be held to have assumed the risk, where he had been employed continuously at that point for three years, and was familiar with the locality and the manner of doing business.—BANCROFT v. BOSTON & M. R. R., N. H., 38 N. E. Rep. 409.

66. MASTER AND SERVANT — Assumption of Risk.—Plaintiff's intestate had been employed by defendant as a brakeman for about three months, was competent and intelligent, and had been frequently over and by the switch which knocked him off the car and caused his death. Said switch was in the same condition as when he entered such employment, and had no hidden defects: Held, that he assumed the risk of injury from the proximity of the switch to the track.—GOODES v. BOSTON & A. R. CO., Mass., 38 N. E. Rep. 500.

67. MASTER AND SERVANT—Degree of Care of Master.—A servant is entitled to expect a reasonably safe place in which to do his work, and that the master shall use reasonable care in the selection of machinery; but it is not the actual condition of such appliances into which the jury is to inquire, but rather into the conduct of the master in respect to their use and keeping in repair, and as to whether or not he has been negligent in his exercise of ordinary care in their maintenance.—PARK HOTEL CO. v. LOCKHART, Ark., 28 S. W. Rep. 28.

68. MECHANIC'S LIEN — Lien for Materials—Contract.—Where plaintiff company delivered to I, through his representations of ownership of land in fact owned by defendant, certain lumber to be used in the erection of a building on said land, it is not entitled to a mechanic's lien, though such lumber was actually used in the erection of such building, if no privity or contract relation existed between I and defendant.—SELLWOOD LUMBER & MANUF'G CO. v. MONELL, Oreg., 38 Pac. Rep. 66.

69. MECHANIC'S LIEN — Notice.—A notice of a mechanic's lien which states that S is the owner of the premises, and caused the building to be erected, that R is the contractor, and that the materials were furnished under a contract with him, sufficiently shows the relationship between the parties.—COLLINS v. SNOKE, Wash., 38 Pac. Rep. 161.

70. MORTGAGE—Foreclosure—Fixtures.—A mortgage by the lessee of the leasehold covers fixtures attached at the time of the execution of the mortgage.—SAN FRANCISCO BREWERIES v. SCHURTZ, Cal., 38 Pac. Rep. 92.

71. MORTGAGE — Subrogation.—Where, on the foreclosure of a vendor's lien against E and J, the vendees, the sheriff deeded the land to E, J and others, all of whom were the vendor's heirs, the vendor's administrator, on subsequently redeeming from the foreclosure of a mortgage on the same land made by E and J, is subrogated to the rights of the mortgagee, as against the shares inherited by E and J, but not as against the shares inherited by others.—GREENE v. BROWN, Ind., 38 Pac. Rep. 519.

72. MUNICIPAL CORPORATION — Improvements—Acceptance by Council.—The acceptance by a common council of a street improvement petitioned for by the owners of the abutting property, and authorized by an ordinance requiring the improvement to be made in accordance with the petition, and to the satisfaction of the council, it appearing that the conditions of the

ordinance have been complied with, that the officers of the city acted honestly in supervising the work, and that such improvement was completed to the satisfaction of the common council, is conclusive upon the abutting property owners.—CHANCE v. CITY OF PORTLAND, Oreg., 38 Pac. Rep. 68.

73. MUNICIPAL CORPORATION — Sidewalks on Street.—Act March 21, 1885, conferring upon certain cities the power "to build and maintain suitable pavement or sidewalk improvements," does not confer the power to require of the abutting owner such excavation as may be necessary to bring the sidewalk to the grade of the remainder of the street.—CITY OF LITTLE ROCK v. FITZGERALD, Ark., 28 S. W. Rep. 82.

74. NEGLIGENCE — Contributory Negligence.—The negligence of a husband who is driving his wife over a railroad crossing, where she is injured, cannot be imputed to the wife.—LAKE SHORE & M. S. RY. CO. v. MCINTOSH, Ind., 38 N. E. Rep. 476.

75. NEGLIGENCE—Dangerous Premises.—Where defendant, the owner of a lot on which was a store, induces the public to use a path over the lot, for his own purposes, instead of the highway, and the building is burned, and a cistern thereunder is left unguarded, he is liable to one using such pathway and falling into the cistern.—LEPNICK v. GADDIS, Miss., 16 Southern Rep. 213.

76. NEGLIGENCE — Injuries Caused by Steamboat.—A complaint which alleges that through the careless, negligent, and unlawful operation of a certain steamboat by defendant, plaintiff's sailboat was run into and sunk, to his damage, states a cause of action.—ROSS v. CHARLESTON, M. & S. TRANSP. CO., S. Car., 20 S. E. Rep. 285.

77. NEGLIGENCE—Injuries to Adjoining Owner.—One who erects a chimney on his land is liable for injuries to an adjoining owner by its fall, when it is not the result of inevitable accident, or wrongful acts of third persons.—CORK v. BLOSSOM, Mass., 38 N. E. Rep. 495.

78. NEGLIGENCE — Injury to Wife — Damages.—In an action for the loss of service of plaintiff's wife, resulting from a miscarriage caused by defendant's brakeman negligently closing a gate upon her as she was entering defendant's car, plaintiff is not entitled to recover damages for the loss of a prospective offspring.—BUTLER v. MANHATTAN RY. CO., N. Y., 38 N. E. Rep. 454.

79. NEGLIGENCE—Vessel—Master.—A master of a vessel cannot defend an action for negligently causing the destruction of the vessel by showing that the orders which caused its destruction were given by him while temporarily insane, such insanity not having been caused by his efforts to save the vessel.—WILLIAMS v. HAYS, N. Y., 38 N. E. Rep. 449.

80. NEGLIGENCE OF SERVANT—Course of Employment.—An invitation to a boy six years old to ride on a colt, given by an employee while leading the colt from a watering tub to its stall, was not an act done in the course of his employment; and his master was not liable for injuries to the boy, caused thereby.—BOWLER v. O'CONNELL, Mass., 38 N. E. Rep. 498.

81. NEGOTIABLE INSTRUMENT—Note—Joint Makers.—Persons who, before delivery, sign on the back of a note, the interest for which is payable in advance, the following agreement: "Waiving demand and notice, we hereby indorse and guaranty the full payment of the within note; future payments of principal or of interest in renewal thereof not releasing us as indorsers,"—are joint makers of the note.—JACKSON BANK v. IRONS, R. I., 30 Atl. Rep. 420.

82. NON-NEGOTIABLE NOTE—Rights of Co-obligors.—Where several obligors on a non-negotiable note place it in the hands of one of their number, he becomes the agent of all, and, where the terms of his agency are expressed in the instrument, every one into whose hands it comes is bound thereby.—WEYMAN v. PERRY, S. Car., 20 S. E. Rep. 287.

83. ORDERS — Actions thereon.—Where defendant authorized B to draw certain orders, which he agreed to pay, and after said orders were drawn told plaintiffs that if they would purchase them he would afterwards accept and pay them, and plaintiffs purchased some of said orders, defendant cannot set up as a defense to them that plaintiffs were neither parties, privies, nor beneficially interested in his contract with B.—KELLEY v. GREENOUGH, Wash., 38 Pac. Rep. 158.

84. PARTITION — Power of Cotenant.—A cotenant cannot by deed, without the co-operation of his cotenants make partition of and convey his own several interest in the common property.—WARTHEN v. SIEFFERT, Ind., 38 N. E. Rep. 464.

85. PRINCIPAL AND SURETY—Ratification.—Where an agent, having possession of securities, exchanges them for others, without authority so to do from his principal, and the principal does not, upon full information, promptly repudiate the transaction and assert his rights, it will be presumed that he acquiesced in and ratified what had been done by his agent.—BALDWIN v. HOWELL, N. J., 30 Atl. Rep. 423.

86. PROCESS—Writs—Service on Foreign Corporation.—Service on foreign corporation by serving its secretary while temporarily in the State in attendance on a Federal Court to testify as a witness in a cause to which such corporation was a party, held invalid, it appearing that such corporation did no business in the State except selling goods through a traveling salesman, and in one instance buying a stock of goods and selling them through an agent specially appointed for that purpose.—AMERICAN WOODEN-WARE CO. v. STEM, U. S. C. C. (N. Y.), 63 Fed. Rep. 677.

87. RAILROAD COMPANY—Fires.—In an action against a railroad company for destruction of grass owned by plaintiff under a verbal lease from the owner of the land, defendant cannot set up the invalidity of the lease.—INTERNATIONAL & G. N. R. CO. v. SEARIGHT, Tex., 28 S. W. Rep. 39.

88. RAILROAD COMPANIES—Liability for Street Assessments.—Terminal property of a railroad company, consisting of a freight house, roadbed, and right of way, cannot be sold, under the provisions of a city charter, for non-payment of assessments thereon for local improvements.—LAKE SHORE & M. S. RY. CO. v. CITY OF GRAND RAPIDS, Mich., 60 N. W. Rep. 767.

89. RAILROAD PASSENGER—Right to Stop Over.—Under Civ. Code, § 490, empowering the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months after the purchase of the ticket, the purchaser of a ticket may stop at any intermediate station, and resume his journey within the six months to the point named as his destination.—ROBINSON v. SOUTHERN PAC. CO., Cal., 38 Pac. Rep. 94.

90. REAL-ESTATE AGENT — Commissions.—Where a broker talks about land which he has for sale (the owner retaining a right to sell it) to one who, not acting for the broker, mentions it to a third person, who purchases from the owner, he is not entitled to a commission.—GLEASON v. NELSON, Mass., 38 N. E. Rep. 497.

91. RECEIVERS.—In an action by judgment creditors of a vendor against the vendee to subject the property conveyed to the payment of their judgments, the vendee may oppose the appointment of a receiver for i by showing that the judgments were procured by fraud.—WHITEHOUSE v. POINT DEFIANCE, T. & E. RY. CO., Wash., 38 Pac. Rep. 152.

92. RELIGIOUS ASSOCIATION. — The duly-appointed elder and the pastor of a voluntary religious association may join with members of the association in a suit to recover possession of the church and parsonage, and to enjoin the trustees and dissenting portion of the congregation from interfering with each in his ecclesiastical rights, and also to compel an accounting for collections taken up, which are payable to the

elder and pastor as salary.—FUCHS v. MEISEL, Mich., 60 . W. Rep. 773.

93. RELIGIOUS SOCIETIES — Evangelical Association.—The laws of an ecclesiastical body will be recognized and enforced by the civil courts if not in conflict with the constitution or the laws of the State.—KRECKER v. SHIREY, Pa., 30 Atl. Rep. 440.

94. SALE ON APPROVAL—Acceptance.—The retention of a corn planter sold on trial by the buyer for a month, he having used it to plant his corn crop and that of a neighbor, precludes him from returning the same as unsatisfactory.—FINTEL v. COOK, Wis., 60 N. W. Rep. 788.

95. SCIRE FACIAS — Forfeited Recognizance—Jury Trial.—As a proceeding by *scire facias* upon a forfeited recognizance is not a civil action, a surety is not entitled, under either Const. art. 2, § 28, providing that the right of trial by jury shall remain inviolate, or under Rev. St. § 2131, providing that an issue of fact in an action for the recovery of money only must be tried by a jury, to have the issues of fact raised by his answer tried by a jury.—STATE v. HOEFFNER, Mo., 28 S. W. Rep. 1.

96. SEDUCTION OF WIFE — Elements of Damage.—In an action for seduction of a wife, a charge that there is no fixed rule for determining plaintiff's compensation, but that the jury must consider the social relations of the parties, the apparent affection of the husband and wife, the actual misconduct of defendant, the pecuniary situation of the parties, and the mental sufferings of the plaintiff, is proper.—MATHIES v. MAZET, Pa., 30 Atl. Rep. 434.

97. STATUTES—Construction.—Where the body of a repealing act does not identify the act intended to be repealed, the title of such repealing act may be resorted to.—SAVINGS BANK OF SAN DIEGO COUNTY v. BURNS, Cal., 38 Pac. Rep. 102.

98. STREET IMPROVEMENTS.—When, in proceedings for the levy of an assessment, the common council is without jurisdiction from the beginning, a person whose property is benefited by the improvement may deny the validity of the proceedings, though he made no objection while the improvement was in progress.—STROUT v. CITY OF PORTLAND, Oreg., 38 Pac. Rep. 126.

99. TAXATION—False Returns.—In an action to recover the forfeiture provided by Laws 1889, ch. 381, § 1, in case a property owner shall "intentionally make a false statement" of his holdings, to avoid the payment of the tax levied, a verdict that the defendant "is guilty, not criminally, but negligently," is one for the defendant.— STATE v. WOLFRUM, Wis., 60 N. W. Rep. 799.

100. TAX JUDGMENT AND DELINQUENT LIST.—A tax judgment and the delinquent list contained a description of the land as follows: "S. E. 4, N. E. 4, and N. E. 4, S. E. 4, S. 24, T. 137, R. 35:" Held, that such description was insufficient, and the judgment void for uncertainty.—KERN v. CLARKE, Minn., 60 N. W. Rep. 809.

101. TAX TITLE—Purchase of by Wife.—The wife of a mortgagor may purchase from her separate estate, a tax title to the land.—WOOD v. AMOUR, Wis., 60 N. W. Rep. 791.

102. TOWN BY-LAW—Clearing Snow from Premises.—The word "building," as used alone in a town by-law requiring the tenant of a "building" to remove the snow from infront of the premises, is broad enough to include "tenement." — TOWN OF EAST HAMPTON v. HILL, Mass., 38 N. E.. Rep. 502.

103 TRESPASS.—The owner of the fee of land may recover of the owner of a right of way over it, damages for breaking down and removing a gate erected across the way by the former, where such gate is necessary to the reasonable use of the land, and does not unreasonably interfere with the use of the right of way by the owner thereof.—WILLE v. BARTZ, Wis., 60 N. W. Rep. 789.

104. TRIAL — Juror — Liquor License.—A juror who states that his prejudice is strong against saloons, or that, in his opinion, to engage in the sale of liquor is an evidence of immorality, is incompetent to serve in proceedings to compel the granting of a license, even though he may also be of the opinion that he could lay his prejudice aside, and give a verdict according to the law and the evidence.—FLETCHER v. CRIST, Ind., 38 N. E. Rep. 472.

105. VENDOR AND VENDEE—Laches—Performance of Contract.—The unexplained delay of the vendee to sue for the specific performance of a contract for the sale of a town lot for 3½ years after the vendor refused to comply with the contract, and took possession of the lot, renders him guilty of laches which bars his right to such relief.—WOLF v. GREAT FALLS WATER-POWER & TOWN-SITE CO., Mont., 38 Pac. Rep. 115.

106. WATER COURSE—Wrongful Diversion.—It is unlawful for a water company, although a riparian owner at the point of diversion, to deprive other riparian proprietors of the use of a stream by diverting, and not returning, large quantities of water therefrom. The right of a riparian owner to have the stream flow as it is wont to do by nature, subject to the reasonable use of other proprietors, is a substantial right which a court of equity will enforce though the damages flowing from such diversion are slight or merely nominal.—RIGNEY v. TACOMA LIGHT & WATER CO., Wash., 38 Pac. Rep. 147.

107. WIFE'S SEPARATE PROPERTY — Policy on Husband's Life.—A life insurance policy taken out by a husband, and made payable to his wife, her executors, administrators, or assigns, is her separate property; and he is entitled to one-third thereof, as heir of the wife, in case she dies first.—IN RE DOBBEL'S ESTATE, Cal., 38 Pac. Rep. 87.

108. WILL—Devise—Estate in Remainder. — Under a devise in a will, after a limitation to the wife for life, "to our seven sons (naming them), or such of them as may be living at their mother's death, and to their heirs, share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share,"—the limitation to each of the sons is a remainder upon a contingency with a double aspect, vesting on the mother's death, or, upon his death before that of his mother, never vesting, but having substituted for it another remainder to his issue. — WHITESIDES v. COOPER, N. Car., 20 S. E. Rep. 295.

109. WILLS—Execution.—The validity of the execution of a will is determined by the law in force at testator's death.—LANGLEY v. LANGLEY, R. I., 30 Atl. Rep. 465.

110. WILL—Probate—Collateral Attack.—A will duly probated by a court of competent jurisdiction cannot be attacked in a collateral proceeding.—HALBERT v. DE BODE, Tex., 28 S. W. Rep. 58.

111. WILL—Trust—Power to Sell.—Where a will empowers a trustee to maintain testator's "son or his family" out of the income of the trust estate, or, if that be insufficient, then, in his discretion, to convert said estate into money to be used for such purpose, or, when it seems advisable, to convey such estate to said son, his heirs and assigns, the trustee may in his discretion, sell the estate to reimburse himself for money advanced by him for the carrying out of such trust, and to repay a person who furnished necessaries to such son or his family.—SMITH v. GREELEY, N. H., 30 N. E. Rep. 413.

112. WITNESS — Credibility— Instructions.—Where a witness' testimony on several trials was conflicting, and he, being confronted with portions of his testimony in the former trials, stated that part of such former testimony was untrue, and that he could not remember as to the rest, it is invading the province of the jury to charge that it is their duty to reconcile the testimony, if possible; that the law does not presume a witness testifies falsely; and that it is better to assume that a witness has made a mistake rather than that he has lied.—ISELY v. ILLINOIS CENT. R. CO., Wis., 60 N. W. Rep. 794.

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